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No. 06-1413

Supreme Court, U.S.
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In The
Supreme Court of the United States

MEADWESTVACO CORPORATION,
successor in interest to THE MEAD CORPORATION,

Petitioner,

v.

ILLINOIS DEPARTMENT OF REVENUE, DIRECTOR OF THE ILLINOIS DEPARTMENT OF REVENUE, AND TREASURER OF THE STATE OF ILLINOIS,

Respondents.

On Petition For A Writ Of Certiorari To The Appellate Court Of Illinois

REPLY BRIEF

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STATEMENT OF THE CASE

Respondents allege that Petitioner misstated or omitted "many of the crucial facts of this case" in its Petition. Brief in Opposition ("Br. in Opp.") 1. This is not true. Respondents are attempting to create factual issues where none exist. As the appellate court recognized, the facts in this matter "are essentially undisputed." App. 2a.

Respondents point to Petitioner's statement that "Lexis/Nexis operated as an independent, nonunitary business of Petitioner for 26 years." *Id.* In support of their assertion that this is misleading, Respondents point to the fact that Lexis/Nexis was included in Petitioner's unitary business group for Illinois income tax filings and allege that it was not until Petitioner realized the gain from Lexis/Nexis that it "altered its position." *Id.*

First, the trial court in this matter found that "Mead and Lexis/Nexis are not unitary." App. 39a. The trial court specifically found that the fact that Lexis/Nexis was included in Petitioner's unitary business group for Illinois income tax filings was not a controlling factor in determining whether a unitary relationship existed. App. 38a.

Moreover, the appellate court set forth as fact that Petitioner included Lexis/Nexis in its unitary business group as the result of a settlement. Although Petitioner disagreed with Respondents' assertion during a previous audit that Lexis/Nexis be included in its unitary business group, in order to settle the disputed audit, Petitioner complied with Respondents' position on the issue until the sale of Lexis/Nexis in 1994. App. 3a. Pursuant to these facts, Petitioner's position that it did not have a unitary

relationship with Lexis/Nexis has been consistent. It is improper for Respondents to assert that Petitioner has misstated the record and "altered its position" on this issue when the record clearly demonstrates otherwise.

As yet another example of a fact apparently omitted by Petitioner, Respondents set forth taxes paid and deductions taken in Illinois attributable to Lexis/Nexis for the period from 1988 through 1993. Br. in Opp. 1. As noted by the appellate court, Petitioner has never disputed that Lexis/Nexis had nexus with, and was subject to tax in, the State of Illinois. Rather it has always been Petitioner's contention that "the taxation of the intangible income, including the gain on goodwill, from the Lexis/Nexis sale was unconstitutional." App. 11a. Therefore, the amounts paid as taxes or taken as deductions are not relevant to the issue before this Court.

The remainder of the facts recited by Respondents in its Statement – Petitioner's capital contributions to Lexis/Nexis, Petitioner's ability to change the form of Lexis/Nexis from division to subsidiary, Petitioner's receipt of tax advantages from its ownership of Lexis/Nexis, Petitioner's inclusion of Lexis/Nexis in describing its business in annual reports and Forms 10-K, Petitioner's investment of Lexis/Nexis' excess cash for the benefit of Lexis/Nexis – all of these factors were addressed in the Petition filed herein. Br. in Opp. 1-3; Pet. 4-5, 7. Indeed, the crux of Petitioner's argument is that such factors amount to nothing more than those actions that would be taken by any conscientious investor in watching over its investment and therefore are not relevant to the issue of whether it had an operational relationship with Lexis/Nexis.

PROCEEDINGS BELOW

With regard to Respondents' description of the proceedings below, Petitioner finds references to the additional issues not before this Court irrelevant, and for the most part does not object to the remainder of the statements with the exception of Respondents' assertion that Petitioner has mischaracterized the testimony of the auditor. The cross-examination of the auditor included the following questions and responses:

Question:	And then you say Mead Corp. and its sub, Lexis-Nexis, were in the same general line of business. Was that your finding, that they were in the same general line of business?
Auditor's Response:	All but Lexis-Nexis. In other words, everybody but Lexis-Nexis is in the same line of business.
Question:	So, Lexis-Nexis is in a different line of business?
Auditor's Response:	That's correct.
*	* *
Question:	Is it correct that in the course of your audit you never found functional integration between Lexis-Nexis and Mead, did you?
Auditor's Response:	No.

* * *

Question:	Isn't it correct that you never found an operational relationship, and I'll give you an example of the Corn Products case. I believe Professor Hellerstein gave the example of somebody, say Mead, who would buy 20 percent of a forest products company because they would have, then, 20 percent of their product to go make their paper?
Auditor's Response:	Right.
Question:	You never found that type of relationship between Lexis-Nexis and Mead?
Auditor's Response:	No.

Record on Appeal, Vol. 10, 6, 10-11. The auditor did not find either functional integration or an operational relationship between Petitioner and Lexis/Nexis. Furthermore, the auditor concluded that Petitioner and Lexis/Nexis were not in the same line of business. The record speaks for itself.

Finally, in response to the quote set forth in the Petition wherein Respondents' stated that the appellate court decision "provides such crucial guidance on a recurring issue," and that "the decision is significant," Respondents do not deny the importance of this case, they

merely again raise issues that are no longer a part of this case. Pet. 11, 18; Br. in Opp. 5-6.

REASONS FOR GRANTING THE PETITION

I. WITHOUT FURTHER REVIEW, THE ILLINOIS DECISION WILL EFFECTIVELY OVERTURN THE OPERATIONAL TEST SET FORTH IN *ALLIED-SIGNAL*

Petitioner's argument is not that it disagrees with the application of the correct law to the facts in this case as asserted by Respondents, but rather that the appellate court applied the incorrect law. As noted in the Petition, not only did the appellate court utilize factors that have never been held by this Court to apply to a determination of an operational relationship, but also the factors utilized by the appellate court have many times not even been utilized by this Court in reaching a determination as to whether a unitary relationship exists.

For example, Respondents assert that whether tax advantages were had and descriptions of business activities in annual reports are factors that are to be considered in determining whether an asset has an operational relationship with a business. Br. in Opp. 10-11. Respondents state that "[n]o such evidence was present in *Allied-Signal*, or in cases like *ASARCO*, or *Woolworth*, where this Court found that income was not apportionable." Br. in Opp. 11.

Contrary to Respondents' assertion, however, and as noted in the Petition, in *Allied-Signal* this Court ignored descriptions of business activities in annual reports that

the Supreme Court of New Jersey had relied upon in reaching the conclusion that an operational relationship existed. *Bendix Corp. v. Director, Div. of Taxation*, 592 A.2d 536, 538-40 (N.J. 1991), *rev'd sub nom. Allied-Signal, Inc. v. Director, Div. of Taxation*, 504 U.S. 768 (1992). Moreover, in *F.W. Woolworth Co. v. Taxation & Revenue Department of New Mexico*, 458 U.S. 354, 369 (1982), "Woolworth's published financial statements, such as its annual reports, were prepared on a consolidated basis" and this Court still found that the income from the affiliates was not apportionable to New Mexico. Finally, other than a mention of ASARCO providing income tax preparation services to Southern Peru, there is nothing in the *ASARCO* decision indicating this Court considered either tax advantages or descriptions of business activities in reaching its decision. *ASARCO Inc. v. Idaho State Tax Comm'n*, 458 U.S. 307, 321 n.17 (1982). Thus, contrary to Respondents' assertion, this is a point raised in a brief which is supported by citation to relevant authority. Br. in Opp. 11.

Respondents argue that there is no support for Petitioner's position that the "focal point of this Court's analysis for the finding of an operational relationship has been whether the asset was utilized directly in the selling company's business, or was utilized as a short-term investment to fund the day-to-day operations of the selling company." Pet. 12-13; Br. in Opp. 8-9. However, this is the same line of inquiry Respondents urge is the relevant inquiry under the operational test, *i.e.*, an inquiry that "focuses on the objective characteristics of the asset's use and its relation to the taxpayer and its activities within the State." *Allied-Signal*, 504 U.S. at 785; Br. in Opp. 10. The characteristics of the asset's use and its relationship

to the taxpayer have to do with how directly the asset is connected to the taxpayer's business.

Furthermore, Respondents' assertion that the relevant inquiry when discussing the operational nature of an asset is whether there is a flow of value between the businesses and whether management takes an active role in the running of the other business is incorrect. Br. in Opp. 9. That is the relevant inquiry when determining if a unitary business exists. With the exception of *Allied-Signal*, the cases cited in support of this proposition by Respondents are all cases where the issue was whether a unitary business existed – *Container, Woolworth, and ASARCO*. Moreover, even if that were the proper analysis, there was no flow of value between the businesses, nor did Petitioner take an active role in the running of Lexis/Nexis. The trial court determined that "Mead and Lexis/Nexis were not unitary," App. 39a, and the appellate court in this matter found that:

> Mead and Lexis/Nexis maintained separate day-to-day business operations, and they did not share personnel or make joint purchases. Since 1980, Lexis/Nexis had its own building about 15 miles from Mead's Dayton headquarters. There was no centralized manufacturing or warehousing of products, and Mead and Lexis/Nexis were described as having different corporate cultures. There were no favorable intercompany transactions.

App. 3a.

II. WITHOUT FURTHER REVIEW, THE ILLINOIS DECISION, WHICH DECIDES AN IMPORTANT FEDERAL QUESTION, WILL STAND IN CONFLICT WITH DECISIONS OF OTHER STATE COURTS OF LAST RESORT

Petitioner relies upon its Petition for showing that the decision of the appellate court is in conflict with decisions of other state courts of last resort. With regard to the one additional case discussed by Respondents, *Citicorp North America, Inc. v. Franchise Tax Board*, 100 Cal. Rptr. 2d 509 (Cal. Ct. App. 2000), *cert. denied,* 533 U.S. 963 (2001), Petitioner refers this Court to its discussion of *Hoechst Celanese Corp. v. Franchise Tax Board*, 22 P.3d 324 (Cal.), *cert. denied,* 534 U.S. 1040 (2001), a later case decided by the Supreme Court of California.

CONCLUSION

Contrary to the Respondents' assertion that Petitioner has only shown that the appellate court misapplied the factors utilized by this Court in reaching a determination as to whether an asset has an operational relationship with a business, Petitioner has shown that the appellate court applied factors never before applied by this Court. Petitioner and the *amici* have shown that the appellate court's decision will effectively overturn the operational test set forth by this Court over 15 years ago in *Allied-Signal*. Furthermore, Petitioner has shown that if not reviewed, the appellate court decision will be in conflict with decisions from the highest courts of other states on this important federal constitutional question.

The Petition for a Writ of Certiorari should be granted.

Dated: July 27, 2007

Respectfully submitted,

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